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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Carriage of the Transmissions	)	
of Digital Television	)	CS Docket No. 98-120
Broadcast Stations	)	
	)	
Amendments to Part 76	)	
of the Commission's Rule	)	

COMMENTS OF THE WEATHER CHANNEL, INC.

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036

(202) 328-8000

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The Weather Channel, Inc., by its attorneys, respectfully files its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

In the NPRM, the Commission asks whether the must-carry rules should be extended to the carriage of digital broadcast signals. The Weather Channel strongly believes that the rules should not be extended during the transition period before broadcasters return their original analog spectrum to the government. While The Weather Channel believes that a transitional digital must carry rule is unconstitutional and beyond the Commission's statutory

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1 Carriage of the Transmissions of Digital Television Broadcast Stations, Amendments to Part 76 of the Commission's Rules, CS Docket No. 98-120, Notice of Proposed Rulemaking (rel. July 10, 1998) ("NPRM").

authority, it focuses in these comments on the practical and policy reasons why such a rule is unjustified.

A transitional digital must-carry requirement will harm non-broadcast programmers and consumers in two specific ways. First, it would force cable operators to drop established non-broadcast services which are popular among consumers, in order to make room for new digital broadcast services, which, by definition, are unproven in the consumer marketplace. As a result, consumers will lose access to programming services they now enjoy and highly value. This is because two-thirds of cable subscribers today are served by cable systems that are channel locked or near channel locked and, therefore, every new digital broadcast signal that a cable operator must add during the transition will require the dropping of one existing non-broadcast service. Second, because mandatory carriage of digital broadcast services will consume substantial amounts of limited capacity, transitional digital must carry will reduce cable operators' ability to make non-broadcast startup services more widely available to consumers, as well as diminish incentives to create new programming for consumers. Simply put, transitional digital must carry creates a grossly unequal playing field in favor of broadcasters, to the detriment of non-broadcast programmers and consumers.

This is particularly disturbing because digital must carry would provide broadcasters with guaranteed carriage of their digital signals <u>regardless</u> of quality and consumer preference. Thus, during the transition period, a cable operator could be forced to drop an existing service in favor of a broadcaster's digital feed even if the existing service was of higher quality and more valued by consumers. Moreover, because most broadcasters have announced their intention to carry duplicative programming on their digital feed, a transitional must-carry rule would actually reduce, rather than enhance, program diversity. It would also present a competitive fairness problem because a cable operator that is forced to carry a digital broadcast service devoted to a certain type of content (e.g., local weather) might be disinclined to carry a competing non-broadcast service of the same type because of the potential overlap in programming between the services.

The case for a transitional digital must-carry rule is even weaker when one considers that, at an initial price of $7,000-$10,000 for a digital TV, only a very small number of consumers will even be able to receive the digital broadcast programming. It seems ludicrous to deny the vast majority of consumers access to existing services so that a handful of high-income, early adopters can get largely duplicative digital broadcast feeds.

Nor will the upgrade of cable systems necessarily solve the problems created by transitional digital must carry. Cable operators that upgrade their plant typically use the additional channel capacity to carry some of the existing non-broadcast services they were previously unable to carry, as well as additional premium services, multiple channels of pay-per-view, digital music, competitive Internet connectivity, and competitive telephony services. In short, the Commission cannot simply assume that system upgrades will result in spare capacity for digital broadcast feeds.

Finally, regardless of the amount of spare channel capacity on any given cable system, the Commission has no legal or policy basis to adopt a transitional must-carry requirement that favors one class of speakers -- broadcasters -- over all other programmers. The broadcasters have no lock on creativity and have shown no superior incentive to invest in the development of new programming. Indeed, given the significant contribution to program diversity made by non-broadcast programmers over the last two decades, a transitional digital must-carry rule that singles out broadcasters for special treatment is particularly unwarranted.

II. DIGITAL MUST CARRY DURING THE TRANSITION PERIOD WOULD CAUSE SIGNIFICANT HARM TO NON-BROADCAST PROGRAMMERS, AND WOULD REDUCE CONSUMER ACCESS TO ESTABLISHED POPULAR SERVICES AND NEW NON-BROADCAST SERVICES.

A requirement that cable operators carry all digital broadcast signals during the transition period would significantly harm non-broadcast programmers and consumers. As to the non-broadcast programmers, a digital must-carry requirement would: (1) force cable operators to drop existing non-broadcast services in order to make room for carriage of new digital broadcast services; and (2) foreclose opportunities to increase the distribution of existing non-broadcast startup services. As a result, consumers would both lose services they currently enjoy and be denied innovative new services. The upgrade of cable systems does not solve the problems created by a transitional digital must-carry rule; the harms to non-broadcast programmers and consumers caused by transitional digital must carry will be significant even in upgraded systems.

A. Cable Operators Will Be Forced To Drop Existing Non-Broadcast Services In Order To Make Room For Carriage Of Digital Broadcast Signals.

Most cable systems today are already operating at or near full capacity.[2] Therefore, a must-carry rule that requires a cable operator to carry a second signal for local broadcasters necessarily means that these systems will have to drop existing non-broadcast services in order to make room for the carriage of the digital broadcast signals.[3]

Major cable operators have recently testified to this fact. For example, Leo Hindery, President of Tele-Communications, Inc., testified before Congress on the impact of a digital must-carry requirement:

> [A] digital must-carry requirement would necessitate that cable operators drop many existing services. As you well know, nearly all cable systems are now operating at full capacity. While digital technology has helped to increase the number of channels available, the number of new programming services has increased at an even greater rate.... For each new digital broadcast service a cable

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[2] Indeed, two-thirds of cable subscribers are served by systems that are currently channel locked. See Nielsen's Cable On-line Date Exchange Service. See also NPRM at ¶ 45.

[3] In its NPRM, the Commission recognized that a transitional digital must-carry rule would mean that non-broadcast services would have to be dropped: "[Under a digital must-carry requirement,] significant cable channel line-up disruptions may occur as cable operators, whose systems are channel-locked, would have to drop existing cable programming services to accommodate the carriage of digital television signals")." NPRM at ¶ 41.

> operator is required to carry under a must-carry rule, one of these existing services will have to be dropped.[4]

Hindery went on to provide an example of how digital must carry during the transition period would impact a particular cable system:

> The [TCI] D.C. system serves over 100,000 subscribers. The system is "channel locked," i.e., all the capacity for providing programming is currently in use. In D.C., we deliver 14 broadcast signals to our customers. A requirement that we carry all digital services provided by all broadcasters would mean that we would have to drop 14 cable programming services that we currently provide to our D.C. customers.[5]

Time Warner Cable similarly testified that it did not have enough capacity for mandatory carriage of digital broadcast signals. Joseph J. Collins, Chairman and CEO of Time Warner Cable, stated:

> [M]any of our systems remain "channel-locked" -- they have no available capacity for adding new services without dropping existing services -- services that themselves may be in the process of investing in digital technology. ... Currently, the Northern Manhattan portion of the New York City system, which is fully channel-locked, offers subscribers a 31 channel basic service tier. Fourteen of those channels are must carry analog broadcast signals. Another nine channels are public, educational, and governmental or leased access channels. That leaves eight "optional"

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4 Testimony of Leo J. Hindery, Jr., President, Tele-Communications, Inc. Before the House Subcommittee on Telecommunications, Trade and Consumer Protection, April 23, 1998, at 14 ("4/23/98 Hindery Testimony").

5 Id. at 15-16. See also "Hindery Sees DTV Deals Before Fall," Broadcasting & Cable, July 27, 1998, at 36 (reporting that "[TCI President] Hindery said that cable systems do not have the technical capacity to carry all broadcasters' digital and analog signals as broadcasters make the transition to digital.").

services, including C-SPAN 1 and C-SPAN 2, that almost certainly would have to be dropped if the system is required to double the number of channels carrying broadcast services in order to comply with a digital broadcast must carry requirement.[6]

In fact, the effect of digital must carry during the transition period could be quite broad. As noted, a significant number of cable systems today are operating at or near full capacity. Thus, a digital must-carry requirement could result in numerous existing programming services being dropped because of the large number of channels that would have to be made available under a digital must-carry requirement. The chart on the following page shows the number of local broadcast stations in the Top 50 DMA markets according to Nielsen. Assuming each broadcaster's second digital feed is required to be carried, the chart also reflects the number of existing services that could be dropped in cable systems in those markets. There simply is no getting around the fact that if the Commission requires cable operators to carry all digital broadcast services during the transition, consumers in many systems will lose access to a significant number of popular programming services they now receive and value highly.

In the case of The Weather Channel, programming which provides consumers with important weather information on a 24-hour-a-day

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[6] Testimony of Joseph J. Collins, Chairman and CEO, Time Warner Cable, before the House Subcommittee on Telecommunications, Trade, and Consumer Protection, April 23, 1998, at 6-7 ("4/23/98 Collins Testimony"). See also Testimony of Joseph J. Collins, Chairman and CEO, Time Warner Cable, before the Committee on Commerce, Science and Transportation, July 8, 1998, at 9-10 ("7/8/98 Collins Testimony") (same).

Rank	Designated Market Area (DMA)	Total Number of Local TV Broadcasting Stations; (parentheses indicate noncommercial stations in this total)	Number of Cable TV Households
1	New York	22 (7)	4,824,730
2	Los Angeles	25 (5)	3,132,980
3	Chicago	16 (3)	1,949,910
4	Philadelphia	20 (4)	2,032,740
5	San Francisco-Oakland-San Jose	24 (5)	1,639,830
6	Boston	20 (5)	1,694,410
7	Washington, D.C.	18 (7)	1,330,770
8	Dallas-Fort Worth	19 (2)	989,090
9	Detroit	10 (1)	1,191,410
10	Atlanta	14 (3)	1,144,080
11	Houston	18 (3)	917,710
12	Seattle-Tacoma	18 (4)	1,103,580
13	Cleveland	14 (2)	1,026,140
14	Minneapolis-St. Paul	19 (6)	745,960
15	Tampa-St. Petersburg-Sarasota	15 (2)	1,042,950
16	Miami-Fort Lauderdale	15 (2)	992,860
17	Phoenix	18 (1)	755,480
18	Denver	19 (3)	741,290
19	Pittsburgh	11 (4)	899,280
20	Sacaramento-Stockton-Moesto	11 (2)	726,490
21	St. Louis	8 (1)	585,170
22	Orlando-Daytona Beach-Melbourne	15 (4)	796,380
23	Baltimore	8 (2)	641,250
24	Portland, OR	10 (2)	611,440
25	Indianapolis	13 (4)	618,080
26	San Diego	7 (1)	762,450
27	Hartford & New Haven	11 (3)	791,980
28	Charlotte	12 (3)	561,420
29	Raleigh-Durham	12 (2)	512,210
30	Cincinnati	9 (4)	490,310
31	Kansas City	10 (2)	517,950
32	Milwaukee	12 (2)	477,410
33	Nashville	12 (2)	496,280
34	Columbus, OH	7 (1)	473,100
35	Greenville-Spartanburg-Asheville-Anderson	12 (4)	428,740
36	Salt Lake City	18 (4)	386,930
37	Grand Rapids-Kalamazoo-Battle Creek	10 (2)	411,670
38	San Antonio	11 (1)	422,290
39	Norfolk-Portsmouth-Newport News	8 (1)	437,830
40	Buffalo	10 (2)	474,740
41	New Orleans	10 (2)	454,630
42	Memphis	9 (2)	390,430
43	West Palm Beach-Fort Piece	10 (3)	495,860
44	Oklahoma City	14 (2)	374,410
45	Greensboro-High Point-Winston Salem	9 (1)	366,510
46	Wilkes Barre-Scranton	8 (1)	452,210
47	Albuquerque-Santa Fe	21 (2)	332,260
48	Providence-New Bedford	8 (1)	433,180
49	Louisville	9 (3)	361,360
50	Birmingham	9 (2)	363,430

SOURCE: Broadcasting & Cable Yearbook 1998 Vol. 1.

basis might be dropped in favor of digital broadcast services. In fact, as an unintended consequence of the analog must carry rules, The Weather Channel was dropped from cable systems serving several hundred thousand homes. The problem is likely to be worse with digital broadcast signals. When analog must carry was imposed, cable operators already carried most analog broadcast signals. In contrast, because broadcasters have not yet begun to offer digital signals, cable operators obviously are not carrying them. Thus, operators will be required to drop an existing service for each digital broadcast signal they are required to carry. This significantly increases the chance that valuable and important services, such as The Weather Channel, will be lost to consumers. The law of unintended consequences is very much at play here.

The loss of existing programming is particularly troublesome for two additional reasons. First, the broadcast programming that cable operators would be compelled to add under a digital must-carry rule would be largely duplicative of the analog broadcast programming already available on the system.[7] Second, given that digital televisions are expected to cost about $7,000 - $10,000 initially,[8] only a <u>very</u> small number of people will be able to

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[7] Many broadcasters have indicated their intention to carry duplicative programming on their digital channel. NBC, for example, has indicated that it will simulcast analog programming on its digital feed because "'[w]e don't have enormous surpluses of library materials that are going to make those other channels all that exciting.'" <u>See</u> "Broadcasters Biting the Bullet on Digital Format Decisions," <u>Media Daily</u>, at No. 5, Vol. 4 (Apr. 6, 1998).

[8] <u>See</u> Paul Farhi, "Four Area TV Stations to Offer Digital Broadcasts," <u>Washington Post</u>, October 7, 1998, at C11; J. Brinkley, (continued ...)

afford them. The vast majority of consumers without digital televisions will either see blank screens on the channels occupied by the digital broadcast signals, or be forced to buy or lease digital boxes that will convert the digital signals into an analog format that is viewable on their current TV.[9] In short, a transitional digital must-carry rule would deny the majority of consumers access to existing and highly-valued non-broadcast services so that a small number of high-income early adopters may watch largely duplicative digital broadcast feeds on their new expensive TVs.

(... continued)

"HDTV: High Definition, High in Price," New York Times, Section G, p. 1 (Aug. 20, 1998); R. Tedesco & G. Dickson, "HDTVs: One (Big) Size Will Fit All," Broadcasting & Cable, at 42 (Mar. 9, 1998).

[9] See 4/23/98 Collins Testimony at 7 ("And while digital set-tops are beginning to become available in conjunction with optional digital cable service offerings, cable subscribers who do not obtain such a device will merely see a blank screen on the channels occupied by the digital broadcast must-carry signals. In short, for millions of cable customers, a digital broadcast must-carry requirement could become a digital set-top "must-buy" requirement. And for what? At the start, at least, a significant portion of the programming broadcast digitally may simply be simulcasts or time-shifted replays of the same programming that is being broadcast over analog channels."); 7/8/98 Collins Testimony at 10 (same).

B. Transitional Digital Must Carry Would Also Foreclose Opportunities For Non-Broadcast Programmers To Increase The Development Of Existing Startup Services, Thereby Further Reducing Program Diversity and Quality.

A transitional digital must-carry requirement would seriously impair the development of new and innovative programming services. By creating another automatic grant of capacity to broadcasters, transitional digital must carry would reduce a non-broadcast programmer's ability to extend the distribution of services that have been launched but have not yet achieved significant distribution, thereby further reducing the diversity and quality of programming available to consumers. The Weather Channel has had direct experience with this dynamic. It recently launched two new weather services. "weatherscan by The Weather Channel" is a digital service providing national and regional weather information through the use of digital set-top boxes. It is an all-graphics service that provides coverage 24-hours-a-day. The Weather Channel also launched a suite of local weather products which give the cable operator flexibility to offer enhanced and more valuable local weather service to consumers. These local weather products include a 24-hour-a-day all graphics service, a 24-hour-a-day all radar service, and local weather inserts that can be used on news or other channels. "weatherscan by The Weather Channel" has approximately 7,000 subscribers and the local weather products offered by The Weather Channel have approximately 700,000 subscribers.

The Commission has recognized that 10-20 million subscribers are necessary for a new program service to achieve long-term success.[10] Achieving this level of carriage for new services is already a difficult proposition in today's environment. In fact, in cases where The Weather Channel has been unable to obtain carriage for its new services, one of the primary obstacles has been a lack of available channel capacity. A transitional digital must-carry requirement would significantly increase this difficulty and ultimately could threaten the viability of non-broadcast startup services.[11]

The result of this dynamic will be a further reduction in the diversity and quality of programming consumers receive. The reduction in diversity will occur because, as noted above, most broadcasters have announced their intention to simulcast their analog programming on their digital channel. Thus, during the transition, consumers will be denied innovative services like "weatherscan by The Weather Channel" and The Weather Channel's

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[10] See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Third Annual Report, 12 FCC Rcd 4358, at ¶ 135 (1997)("The available evidence suggests that a successful launch of a new mass market national programming network -- that is, the initial subscriber requirement for long-term success -- requires that the new channel be available to at least ten to twenty million households.") See also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034, at ¶¶ 155, 165 (1998)(citing 15 to 20 million as the critical number) ("1997 Video Competition Report").

[11] For the same reasons, a transitional digital must-carry requirement would reduce the incentives of non-broadcast programmers to make the substantial investment necessary to create, launch, and promote new services, including digital services. This, in turn, would further reduce the diversity and quality of programming.

local weather products in favor of duplicative broadcast content. Similarly, a transitional digital must-carry rule could result in consumers being denied better quality services. For example, if cable operators are forced to carry digital broadcast signals, then they may not have sufficient capacity to carry a non-broadcast programmer's service even if it is superior in quality. In effect, digital must carry ignores program diversity and quality in order to extend further the marketplace advantage broadcasters already enjoy with analog must carry.

Finally, in addition to causing a reduction in program diversity and quality, a transitional digital must-carry requirement would pose a competitive fairness problem. A cable system faced with forced carriage of a particular digital broadcast service may not wish to carry a competing non-broadcast service because of the potential overlap in programming that would result. Consider the following:

> **EXAMPLE:** Assume a cable system has two spare channels available and that there is a single digital broadcast service that is not currently being carried by the cable system. Assume also that this local broadcaster has developed a local weather service for delivery on its digital feed and that The Weather Channel has sought carriage on this system for one of its new local weather services. If the cable operator is <u>required</u> by the Commission to carry the broadcaster's digital local weather service, the cable operator might decline to carry The Weather Channel's local service on the other spare channel because of the potential overlap in programming content between these two competing services.

The Commission should not be the sponsor of such a competitively unfair outcome.

C. **The Commission Is Without A Legal Or Policy Basis To Adopt A Digital Must-Carry Requirement That Harms Non-Broadcast Programmers And Consumers Solely In Order To Create A Built-In Marketplace Advantage For Broadcasters.**

As indicated above, a digital must-carry requirement would restrict distribution and development of both existing and new programming services in order to create a marketplace advantage for broadcasters at the expense of non-broadcast programmers and consumers. Such a government-sponsored advantage is wholly unjustified.

As an initial matter, The Weather Channel strongly endorses the comments filed today by NCTA which clearly demonstrate that a transitional digital must-carry requirement is both constitutionally impermissible and beyond the Commission's statutory authority.

Moreover, there is no policy basis to justify giving broadcasters preferential treatment during the transition period. Non-broadcast programmers have invested and continue to invest significant amounts of capital and resources to create new programming services. From 1990 to 1997, basic cable networks invested close to $20 billion on programming.[12] In 1997 alone, basic cable networks invested $4.1 billion on programming.[13] As a

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[12] See Paul Kagan Associates, Inc., Cable Program Investor, at 2-3 (Mar. 13, 1998).

[13] See id. at 1; 4/23/98 Hindery Testimony, at 14-15 (cable programmers invested over $5 billion on programming in 1997).

result of this sustained investment, non-broadcast programming has flourished. For example, the number of national non-broadcast services has grown from 70 in 1990 to 172 in 1997. And the diversity and quality of the services developed by non-broadcast programmers is extraordinary. Non-broadcasters have been responsible for creating services devoted to children, science, history, public affairs, minorities, sports, news, music, weather, and much, much more.[14] Equally important, as "weatherscan by The Weather Channel" and The Weather Channel's new local products demonstrate, non-broadcast programmers have created and are offering to consumers quality local and regional services akin to those services offered by broadcasters and which broadcasters have often cited as a basis for their receiving preferential regulatory treatment.

There simply is no evidence to suggest that broadcasters have a lock on creativity or a superior inclination to risk the investment necessary to develop new programming services. Chairman Kennard recently recognized that broadcasters do not have a unique stranglehold in the programming area:

> Broadcasters want the government to extend their right to cable carriage to new digital channels, asserting they bring a unique, free public service to Americans. As cable operators create local programming, particularly news and public affairs shows, and with almost three quarters of Americans actually paying to receive these channels, what

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[14] See 1997 Video Competition Report at ¶ 158, Tables F-1 and F-2; Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, First Annual Report, 9 FCC Rcd 7442, at ¶ 161, App. G Tables 3 and 4 (1994).

> remains that makes broadcasters unique? And is this uniqueness significantly tangible, demonstrable, and assured to justify requiring cable carriage?[15]

The broadcasters already have been guaranteed carriage of one service -- their analog channel. The history of the programming business demonstrates that there is no sound basis for the Commission to justify giving broadcasters yet another guarantee that their second, digital channel will be simultaneously carried on cable systems, particularly given that (as shown above) such forced carriage would cause significant harm to consumers, cable operators, and cable programmers.[16]

D. The Harms To Non-Broadcast Programmers And Consumers That Would Be Caused By A Transitional Digital Must-Carry Requirement Will Be Significant Even In Upgraded Cable Systems.

The number of programming services vying for cable carriage today exceeds the number of available channels, so that even an increase in a cable system's channel capacity will not fully solve the capacity problems inherent in a digital must-carry rule. As noted, the Commission has reported that there are more than 172 national non-broadcast services and another 77 such services

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15 See Remarks of William E. Kennard, Chairman, Federal Communications Commission, The International Radio and Television Society, New York, NY (September 15, 1998), at 4.

16 It is worth noting that the broadcasters were given an additional benefit, i.e., Congress gave them an additional 6 MHz of bandwidth spectrum for free.

planned for launch by year's end.[17] The majority of cable systems today have between 30 and 53 channels.[18] When cable operators expand capacity, they typically add non-broadcast services not previously carried on the system, new premium services, multiplexed versions of premium services, and multiple pay-per-view channels. In addition, many cable operators today add innovative non-broadcast services, such as digital music, competitive Internet connectivity, and competitive telephony, when they upgrade and expand capacity.[19] Thus, an increase in capacity does not necessarily mean that there is "free" capacity available for digital broadcast signals.

A good example of this dynamic can be found in the TCI D.C. cable system. The D.C. system recently implemented digital technology, adding 36 new channels. Eight of these new channels were devoted to expanding the system's pay-per-view offerings, 3 to multiplexing existing premium services, and 10 to digital music services. The remaining 15 channels were used to add new programming services or existing services not previously carried on the system.[20] In short, the channels resulting from the additional

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17 1997 Video Competition Report at ¶ 158, Tables F-1 through F-4.

18 See id. at Table B-3 (using statistics as of October 1, 1997).

19 See, e.g., 4/23/98 Hindery Testimony at 2-3 (describing uses of additional channels added to the D.C. system due to digital channel compression).

20 See id.

digital technology added by the system were taken very quickly and there are still many programming services trying to obtain carriage on that system. For example, The Weather Channel has not yet been able to obtain carriage on the D.C. system for its local weather products and "weatherscan by The Weather Channel." Thus, even though cable operators are expanding channel capacity, non-broadcast programmers will continue to struggle to obtain carriage on cable systems subject to a transitional digital must-carry requirement.

III. CONCLUSION

A digital must-carry requirement during the transition period would significantly harm non-broadcast programmers. In addition, such a requirement would deny consumers access to programming services they now enjoy and highly value, as well as new, innovative and quality programming services. The Weather Channel consequently urges the Commission not to adopt rules requiring that cable operators carry digital broadcast signals during the transition period.

Respectfully submitted,

Michael Hammer

THE WEATHER CHANNEL, INC.

Michael H. Hammer
Pamela S. Strauss

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384
(202) 328-8000

Its Attorneys

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